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Supreme Court, U.S.
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In The

Supreme Court of the United States

LONNIE DIVINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LONNIE DIVINE
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QUESTION PRESENTED

1. When a defendant discovers post sentencing and alleges that his defense counsel played a large part in initiating the prosecution of the client and alleges documentary evidence and the availability of a court officer to testify to the same, in addition to witness testimony (court officer), of the defense counsel's direct threats; was defendant entitled to an evidentiary hearing in a collateral attack proceeding pursuant to the holdings in this Court's intervening decision in *Schriro v. Landrigan*, 550 U.S. ___ (2007) and 28 U.S.C. § 2255; and in any event, whether Petitioner is entitled to a certificate of appealability on the issue.

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PETITION FOR A WRIT OF CERTIORARI

Lonnie Divine, hereby respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, *infra*, 1a), which affirmed the district court decision and declined a certificate of appealability (App. B, 2a-9a), is a non-published opinion.

JURISDICTION

The final judgment of the Court of Appeals was entered on March 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral

attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Title 28 U.S.C. § 2253(c)(1)(A)

In pertinent part under 28 U.S.C. § 2253(c)(1)(A), a person must first obtain a certificate of appealability ("COA") before he may obtain appellate review of the district court's denial of habeas relief. A COA can issue only if petitioner makes a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In order to make a requisite showing, the applicant must demonstrate that the issues are indeed debatable among jurist of reason; the issues state a valid constitutional claim; and, that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 474 (2000).

STATEMENT

Petitioner Lonnie Divine was a 66-year-old magazine sales person who was prosecuted for tax offenses arising in the Southern District of California. Little did Mr. Divine know, the tax professionals he went to for advise prior to any prosecution subsequently concocted a scheme to notify federal authorities of possible tax offenses and proceeded to prod the government into initiating a federal prosecution against Mr. Divine and devised a labyrinth involving several individuals, tax preparation companies,[1] and attorneys to secret money from him to defend the prosecution. As will be set forth herein below, the scheme was uncovered subsequent to sentencing for which the district court refused to grant any hearing on the claims or allow Mr. Divine to submit his evidence.

A. History of the Proceedings Below

On January 30, 2003, Petitioner Lonnie Divine was named in a one-count Information filed in the Southern District of California, therein alleging a violation of 18 U.S.C. § 371, *Conspiracy to Defraud the United States*. On February 4, 2003, Petitioner consented to a plea to the one-count Information, and waived formal Indictment. On July 17, 2003, Petitioner's motion to withdraw his guilty plea was granted.

On September 9, 2003, a grand jury sitting in the Southern District of California returned a two-count

[1] As will be set forth herein below, the attorney with the tax preparation and accounting company was discovered to have been suspended from the practice of law for engaging in a fraud very similar to the case herein, Petitioner Divine's.

Indictment therein charging Petitioner, Yvonne Divine and Deanna McKinnon, with violations of 18 U.S.C. § 371 – *Conspiracy to Defraud the United States*, and 26 U.S.C. § 7201 – *Tax Evasion*, Counts One and Two respectively. On the same date, a superseding Indictment was issued alleging the afore stated identical violations. On February 19, 2004, Petitioner filed a motion and memorandum in support to dismiss the Indictment on the affirmative defense of a statute of limitations. The district court denied the motion on May 10, 2004. On August 17, 2004, a second superseding Indictment by the grand jury was filed therein delineating the same alleged statutory violations of the first Indictment.

On November 8, 2004, pursuant to a plea agreement, Petitioner pled guilty to count two of the second superseding Indictment. On June 6, 2005, Divine was sentenced to a custody term of 18 months and three (3) years of Supervised Release.

On December 29, 2005, Petitioner filed a collateral attack pleading under 28 U.S.C. § 2255. (App. C, *infra*, 10a-21a). Petitioner set forth in clear and concise detail the scheme involving his defense counsel whereas Petitioner uncovered evidence that his previous counsel initiated the prosecution by notifying the Internal Revenue Service and requested them to prosecute defendant. Further, Petitioner set forth an allegation that his attorney made direct threats to him at the guilty plea hearing and that a court officer was available and willing to testify.

On April 6, 2006, the district court denied the action and denied an evidentiary hearing and stated Petitioner never made any allegation to warrant a hearing. Petitioner

filed a motion to reconsider pointing to the record and pleading.

The district court again denied the reconsideration and declined to hold a hearing despite the readily apparent allegations in the motion. The Court further denied a request for a certificate of appealability in the body of the order denying the section 2255 pleading.

A timely notice of appeal was filed and a request for COA to the Ninth Circuit. On April 2, 2007, the request for COA was denied without discussion. This request for a writ of certiorari follows.

B. Statement of Facts

The basis of the collateral attack action arose as a result of Petitioner uncovering evidence of a gross conflict of interest with his previous defense counsel which showed that his counsel actually had a hand in initiating the prosecution of himself and his wife.

Specifically, Divine had previously contacted the I.R.S. tax professional office of Barnhardt, Moskowitz and Nixdorf to audit his liability for taxes. Divine paid the fee of $50,000.00 to the company for a requested "settlement fund." Shortly thereafter, an agent of the tax professional office (Attorney Stepanian), traveled to Florida advising him (Divine) that he had information that petitioner and his wife were about to be indicted and requested $250,000.00 to defend him and his wife. Petitioner had no knowledge, nor did attorney Stepanian disclose, that this attorney was connected to the tax professional accounting office. Stepanian then referred Petitioner Divine's case to his associate, William Cohen. Little did Divine know,

Cohen had previously received approximately $20,000.00 from the tax preparation office on Divine's case for purpose of tax auditing. In fact, Cohen disavowed any relation to the tax office. Moreover, unknown to Divine, the tax office and one of the attorneys had previously been found guilty in a State Bar disciplinary hearing of fraud involving a very similar scheme of acquiring "settlement funds for the I.R.S.," and subsequently misappropriating the money. Petitioner Divine also alleged in his collateral attack pleading that counsel Cohen made direct threats to him which were witnessed by a court officer who was willing to testify. Despite a very thorough pled motion, the district court denied the section 2255 action and denied an evidentiary hearing stating that Petitioner had made no allegation that warranted a hearing "not even a self-serving statement." Petitioner was astonished at the court's position on the hearing and moved for reconsideration and pointed out the plethora of allegations in the brief. Once again, the court denied the motion without further discussion. The Court of Appeals likewise denied the request for a certificate of appealability without discussion.

REASONS FOR GRANTING THE PETITION

This case provides the Court with valid and important reasons to exercise its discretionary power of review and grant summary judgment: (1) subsequent to the appellate action, this Court issued its intervening decision in *Schriro v. Landrigan*, 550 U.S. ___ (2007); and (2) the appellate decision conflicts with this Court's previous decision(s) in *Tennard v. Dretke*, 542 U.S. 274 (2004) and *Miller v. El-Cockrell*, 537 U.S. 322 (2003).

It would be appropriate to review the aspects of the case on petition as it involves issues of exceptional importance affecting Due Process and Sixth Amendment rights.

FIRST ISSUE

When a defendant discovers post sentencing and alleges that his defense counsel played a large part in initiating the prosecution of the client and alleges documentary evidence and the availability of a court officer to testify to the same, in addition to witness testimony (court officer), of the defense counsel's direct threats; was defendant entitled to an evidentiary hearing in a collateral attack proceeding pursuant to the holdings in this court's intervening decision in *Schriro v. Landrigan*, 550 U.S. ___ (2007) and 28 U.S.C. § 2255; and in any event, whether Petitioner is entitled to a certificate of appealability on the issue.

In the Ninth Circuit panel opinion of March 27, 2007, the Court simply denied the request for a certificate of appealability without discussion. Therefore, the affirmation of the district court order requires the Court to examine the district court decision.

As a threshold matter, Petitioner is aware of the standard for granting an evidentiary hearing during the course of a 28 U.S.C. § 2255 collateral attack proceeding and the standard for granting a certificate of appealability from the denial of the section 2255 action.

Specifically, under 28 U.S.C. § 2253(c)(1)(A), a person must first obtain a certificate of appealability ("COA") before he may obtain appellate review of the district court's denial of habeas relief. A COA can issue only if

petitioner makes a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In order to make a requisite showing, the applicant must "demonstrate that the issues are indeed debatable among jurist of reason; the issues state a valid constitutional claim; and, that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 474 (2000).

This Court's decision in *Tennard v. Dretke*, 542 U.S. 274 (2003), provides guidance on whether "reasonable jurist would find the district courts assessment of the constitutional claims debatable or wrong," and whether a COA should issue. As this court held in *Miller v. El-Cockrell*, 537 U.S. 322 (2003), under the 'reasonably debatable' standard, Petitioner Divine was not required to show that he would succeed on his claim – for he has already failed in that endeavor – but rather, he must only show that a reasonable jurist could resolve the issue differently.

Before deciding whether Petitioner has met the foregoing standard, we must examine the underlying issues. In this case, Petitioner set forth a plethora of allegations concerning the direct conflict of interest whereas his defense counsel played a large part in initiating the prosecution for financial gain. Petitioner set forth his allegation of documentary evidence along with the available testimony of a court officer and requested an evidentiary hearing. *See* App. C, 10a-21a, *infra*.

Subsequent to the appellate action in this case, this Court issued its intervening decision in *Schriro v. Landrigan*, 550 U.S. ___ (2007), regarding evidentiary hearings. "A federal court must consider whether the hearing could

enable an applicant to prove the petition's factual allegations, which if true would entitle him to federal habeas corpus relief." *Ibid. See also, Sanders v. United States*, 373 U.S. 1 (1963); 28 U.S.C. § 2255.

As Petitioner noted previously, an abundance of facts were alleged by Divine which would entitle him to relief regarding defense counsel's part in initiating the prosecution of the offense. *See* App. C (§ 2255 pleading), 13a-16a. Nevertheless, the district court astonishingly stated, "petitioner had not alleged a single allegation or even a self-serving statement to warrant an evidentiary hearing."

Petitioner again filed a motion to reconsider pointing out the clear and concise pleading delineating the allegations. *See* App. D, 22a-24a, attached *infra*. The motion was denied without discussion as was the Court of Appeals decision.

It is clear that if Divine were allowed a hearing to prove his claims he would be entitled to federal habeas relief. Consequently, he was entitled to a certificate of appealability on the issues.

CONCLUSION

As a result of the intervening decision in *Schriro v. Landrigan*, 550 U.S. ___ (2007), the opinion of the appellate court which affirmed the district court opinion herein is in error and should be summarily reversed. The petition for certiorari should be granted, consistent with the *Schriro* doctrine.

Respectfully submitted,

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June 25, 2007

Corrected Petition filed August 14, 2007.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LON RAYMOND DIVINE, a.k.a. Lonnie R. Divine; et al., Defendant-Appellant.	No. 06-55719 D.C. Nos. CV-05-02378-BTM CR-03-00273-BTM Southern District of California, San Diego ORDER (Filed Mar. 27, 2007)

Before: B. FLETCHER and THOMAS, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LONNIE DIVINE, Movant, vs. UNITED STATES OF AMERICA, Respondent.	CASE NO. 05cv2378 BTM 03cr273 BTM **ORDER DENYING MOTION PURSUANT TO 28 U.S.C. § 2255 AND DENYING CERTIFICATE OF APPEALABILITY** (Filed Mar. 16, 2006)

Movant Lonnie Divine ("Divine") has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. For the reasons discussed below, Divine's motion is **DENIED**.

I. FACTUAL BACKGROUND

In an Information filed on January 30, 2003, Divine was charged with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. On February 4, 2003, Divine entered a plea of guilty and waived Indictment pursuant to a plea agreement. On July 17, 2003, the Court granted an oral motion Divine made to withdraw his guilty plea.

In a second superseding Indictment ("Indictment") filed on August 17, 2004, Divine was charged with conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and tax evasion in violation of 26 U.S.C. § 7201. The Indictment also charged Divine's wife with conspiracy to defraud the United States and tax evasion

and Divine's daughter with conspiracy to defraud the United States.

On November 8, 2004, pursuant to a plea agreement ("Plea Agreement"), Petitioner entered a plea of guilty to Count Two (tax evasion) of the Indictment. On June 6, 2005, Divine was sentenced to custody for a term of 18 months and three years of supervised release.

II. DISCUSSION

Divine argues that his sentence should be vacated because: (1) counsel who represented him in connection with his guilty plea was ineffective due to an undisclosed conflict of interest; (2) he was coerced into entering the plea agreement; (3) counsel who represented him in connection with the sentencing was ineffective for failing to provide him with a copy of the presentence report at least 35 days before sentencing; and (4) counsel was ineffective for failing to object to a two-point enhancement for "sophisticated means of concealment" under U.S.S.G. §2T1.1(b)(2). As discussed below, none of these arguments has merit.

A. Ineffective Assistance Due to Conflict of Interest

Divine claims that William Cohan, retained counsel who represented Divine in connection with the Plea Agreement and guilty plea, had a conflict of interest that rendered the plea invalid.

According to Divine, unbeknownst to him, Cohan had previously been involved in a fraud upon Divine. Divine

alleges that in September of 1998, he hired the law firm of Moskowitz, Nixdorf & Barnhart, LLP[1] to make contact with the IRS for purposes of resolving any tax issues with respect to himself and his wife. Divine allegedly paid the firm a retainer fee of $50,000. However, the firm subsequently went bankrupt and never rendered the services promised.

Divine claims that in actuality, the Moskowitz firm paid Cohan to represent Divine's interests. Divine claims that Cohan never performed any services and, even worse, contacted the government about prosecuting Divine so that Cohan could represent Divine and obtain a large retainer fee. Cohan allegedly sent another attorney to Divine's home and had this attorney refer Divine to Cohan.

Divine claims that Cohan never revealed his previous involvement with the Moskowitz firm or his communications with the IRS. Divine argues that had he been aware of these facts, he would not have hired Cohan and would not have pled guilty under Cohan's advice.

The problem with Divine's conflict-of-interest claim is that there is no evidence to support it. Divine has not produced one shred of evidence, not even a self-serving declaration, in support of his tale of deception and intrigue. Divine's naked allegations are insufficient to warrant an evidentiary hearing on the matter. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989) (explaining that "[m]ere conclusory allegations do not warrant an evidentiary hearing.")

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[1] Judge Moskowitz is not aware of any connection between himself and the Moskowitz firm.

B. Involuntary Plea

Divine claims that Cohan coerced him into pleading guilty by physically intimidating him and threatening him. Divine alleges:

> Counsel Cohan lost his composure, physically struck the surrounding fixtures and yelled at Petitioner in a threatening instruction that if he [Petitioner] did not accept the government's offer and plead to the offense, he would be immediately revoked on his bail, be given a minimum of five years custody and for which he [counsel Cohan], would immediately withdraw from the representation of Petitioner. Cohan further advised Petitioner he did not want to hear from any expert witnesses previously retained by Petitioner nor any further alleged defense of the charges. Additionally, Cohan advised his wife and daughter would receive a 5 year term.

(Def.'s Motion at 6:5-13.)

Again, Divine offers no evidence in support of his allegations. Furthermore, Divine's claim that he was coerced into pleading guilty is not credible.

Upon review of the transcript of the disposition hearing, the Court is satisfied that Divine's guilty plea was knowing and voluntary. (Transcript of 11/8/04 (Gov't Exh. 2).) The Court specifically asked Divine, "Do you feel pressured into pleading guilty to help your wife and daughter get their plea agreement?" (*Id.* at 11.) Divine said, "No, your Honor." (*Id.*) When asked, "And is your guilty plea voluntary?," Divine answered in the affirmative. (*Id.* at 43.) The Court also asked, "Has anyone threatened you or coerced you or pressured you or any

members of your family to get you to plead guilty?" (*Id.*) Divine said, "No, your Honor." (*Id.*)

If Divine believed he was coerced into entering the Plea Agreement, Divine could have made a motion to withdraw his plea, just as he had done previously. At the sentencing hearing, the Court specifically asked Divine whether he wanted to withdraw from the Plea Agreement. (Transcript of 6/6/05 hearing (Gov't Exh. 3), p. 55.) After consulting with Divine, Divine's new attorney said that Divine was not going to withdraw from the Plea Agreement. (*Id.*)

Divine's claim that his plea was involuntary is contradicted by the record and is wholly incredible. Therefore, Divine is not entitled to relief on this claim.

C. Ineffective Assistance at Sentencing

Divine also claims that Noel Spaid, the attorney who represented him at sentencing, was ineffective for failing to provide Divine with a copy of the presentence report prior to the sentencing hearing and for failing to object to the two-point enhancement under U.S.S.G. §2T1.1(b)(2).

Divine's claims of ineffective assistance at sentencing fail because Divine waived his right to collaterally attack the sentence. (Plea Agreement ¶ XI.) A waiver of appeal and/or collateral attack of a conviction is enforceable if voluntarily made. *United States v. Pruitt,* 32 F.3d 431, 433 (9th Cir. 1994). However, if ineffective assistance of counsel renders the plea agreement containing the waiver involuntary, the defendant may appeal or collaterally attack his sentence. *Washington v. Lampert,* 422 F.3d 864, 870-71 (9th Cir. 2005). The Court has already rejected

Divine's claim that ineffective assistance of counsel rendered the plea agreement involuntary. His claim that Ms. Spaid was ineffective at sentencing does not pertain to the voluntariness of the plea and, therefore, has been waived.

At any rate, Divine's claims lack merit. With respect to counsel's failure to provide Divine with the presentence report prior to the sentencing hearing, Divine has not shown that he suffered any prejudice. At the hearing, the Court asked Spaid whether Divine had read the presentence report. (Transcript of 6/6/05 hearing at 37.) When it became clear that he had not, the Court directed Divine to read the report and to let the Clerk know when he was finished. (*Id.*) After Divine read the report, the Court asked Spaid whether she had discussed the report with Divine. (*Id.* at 38.) She confirmed that she had. (*Id.*) The Court then asked her if there were any inaccuracies. (*Id.*) Spaid objected to five separate portions of the presentence report, two of which were struck by the Court. (*Id.* at 38, 57-62.) Thus, Divine had the opportunity to review the presentence report and to challenge any inaccuracies therein.

In his reply papers, Divine argues that he was prejudiced by counsel's failure to provide him with a copy of the presentence report at least 35 days prior to the sentencing hearing, because, if given the time, he could have discovered the information he now allegedly possesses regarding the "government's severely bloated guesses and triple counting of figures, much less the circular re-deposited casino advances." (Reply, 10:1-5.) Once again, Divine fails to provide evidence in support of his conclusory allegations.

Furthermore, the Plea Agreement, which the Court finds to be valid, provides that Divine admits that he caused a tax loss of more than $200,000 and less than $325,000. (Plea Agreement ¶ 2B.) Thus, he cannot dispute this amount. Indeed, at the sentencing hearing, Spaid took issue with the Government's calculation of the tax loss. (Transcript of 6/6/05 hearing at 38-55.) Based on Spaid's argument that the Government's figure was not accurate, the Court inquired, "So you are withdrawing from the plea agreement? Because the agreement says the parties jointly agree that for criminal purposes, in other words for the guideline purposes, the tax loss for 1994 through 1997 is more than $200,000 and less than 325,000." (*Id.* at 55.) After discussion with Divine, Spaid said, "Your honor, he is not going to withdraw from his plea agreement." (*Id.*)

Divine's argument that Spaid should have objected to the two-point enhancement also fails because Divine agreed to it. Pursuant to the Plea Agreement, ¶ X, the parties jointly recommended the two-point enhancement for "use of sophisticated concealment." At any rate, the facts Divine admitted as true support application of the enhancement. He admitted to utilizing various methods of evading taxes, including: transferring gross receipts of Divine Enterprise through several bank accounts; using cashier's checks, official checks, money orders, and currency to acquire assets and funds; and using business assets to make approximately $1.8 million in payments to his casino accounts in Nevada. (Plea Agreement, ¶ II.B.) This scheme was "sufficiently more complex" than routine tax evasion. *See United States v. Aragbaye*, 234 F.3d 1101, 1107-08 (9th Cir. 2000). That Divine may have attempted to approach the IRS about settlement in 1998 does not

mean that he did not seek to evade taxes before that time or even afterwards.

III. CONCLUSION

For the reasons discussed above, Divine's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is **DENIED**. The Court also **DENIES** a certificate of appealability. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Dated: March 15, 2006 /s/ Barry Ted Moskowitz
HONORABLE
BARRY TED MOSKOWITZ
United States District Judge

cc: All parties and counsel of record

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, Vs. LONNIE DIVINE, Defendant.	) CIVIL NO. _____) Related Crim. Case No. 03CR273-BTM) 03CR2508-BTM (Consolidated)) **DEFENDANT'S MOTION TO VACATE, SET-ASIDE, AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255**) (Filed Dec. 29, 2005)) Dept:) HON. BARRY T. MOSKOWITZ

COMES NOW, defendant Lonnie Divine, by and through undersigned counsel and hereby files this motion to vacate and set-aside the conviction and sentence pursuant to Title 28 U.S.C. § 2255. As reasons therefore, Defendant/Petitioner alleges: (1) The plea was neither voluntary

or intelligent; and, (2) ineffective assistance of counsel during the plea process[1] and sentencing.

I.

Background

1. Procedural History:

On or about January 30, 2003, Petitioner Lonnie Divine was initially named in a one-count information filed in the Southern District of California, therein alleging a violation of 18 U.S.C. § 371, *Conspiracy to Defraud the United States* (Doc. entry #1). On February 4, 2003, Petitioner consented to a plea to the one-count Information, and waived formal Indictment. On July 17, 2003, Petitioner's motion to withdraw his guilty plea was granted. (Doc. entry # 13).

On September 9, 2003, a grand jury sitting in the Southern District of California returned a two-count Indictment therein charging Petitioner, Yvonne Divine and Deanna McKinnon, with violations of 18 U.S.C. 371- *Conspiracy to Defraud the United States,* and 26 U.S.C. § 7201 – *Tax Evasion.* Counts One and Two respectively. On the same date, a superseding Indictment was issued alleging the forestated identical violations. (Doc. entry # 20). On February 19, 2004, Petitioner filed a motion and memorandum in support to dismiss the Indictment on the affirmative defense of a statute of limitations. (Doc. entries #65 and 66). The district court denied the motion on May 10, 2004. (Doc. entry # 96). On August 17, 2004, a

[1] [Illegible] with the ineffective assistance claim, Petitioner alleges that defense counsel at the time of plea had [illegible] interest.

second superseding Indictment by the grand jury was filed therein delineating the alleged same statutory violations of the first superseding Indictment. (Doc. entry # 115).

On November 8, 2004, pursuant to a plea agreement, Petitioner pled guilty to count two of the second superseding Indictment. On June 6, 2005, Divine was sentenced to a custody term of 18 months and three (3) years of Supervised Release. No direct appeal was filed with the Ninth Circuit Court of Appeals.

II.

Argument and Discussion

1. Ineffective Counsel:[2]

Petitioner is mindful of the familiar two-part *Strickland*[3] test when alleging Sixth Amendment violations of Ineffective counsel and in order to prevail on such a claim a defendant must show: (1) that his attorney's representation fell below an objective standard of reasonableness; *and* (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. With regard to the first prong, a defendant must identify the specific acts or omissions of counsel that form the basis for his claim of ineffective assistance. *Id.* at 690. As to the prejudice prong, a "reasonable probability" of a different result means a probability sufficient to undermine confidence in the

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[2] Petitioner will discuss each claim of ineffective counsel individually as to each attorney inasmuch as the claims involve two separate defense counsel.

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

outcome. *Id.* at 694. However, when the issue surrounds an actual conflict of interest, (which is one of the claims herein), the test in the *Strickland* sense is not applicable and prejudice is presumed. Additionally, representation regarding application of Sentencing Guidelines falls below an objective standard of reasonableness when it fails to recognize overt and compelling legal authority favorable to the defendant.

Counsel William Cohan-Conflict of Interest

As a threshold matter, Petitioner submits that counsel William Cohan, his retained counsel at the time of plea, had a conflict of interest that rendered the plea constitutionally defective on numerous grounds. Based upon evidence, information and belied counsel Cohan was part of a fraud upon Petitioner involving $50,00.00 [sic] prior to his actual representation.

On or about September of 1998, Petitioner contacted a law firm under the advertised name of "888 TAX DEAL", also known as the law firm of MOSKOWITZ,[4] NIXDORF & BARNHART, LLP. Petitioner retained the firm for a sum of fifty-thousand dollars ($50,000.00), to make contact with the Internal Revenue Service for purpose of any tax filings and settlement of any amount due and owing on behalf of himself and his wife Yvonne Divine. After payment was made and a period of time elapsed, Petitioner was advised the firm filed bankruptcy and the services promised were never rendered. Unbeknown to Petitioner, counsel William Cohan was acting on behalf of the

[4] Petitioner is unable to determine any relation of the Moskowitz firm to the Honorable Judge Moskowitz of this court.

Moskowitz firm and was allegedly paid by the firm to intervene on Petitioner's behalf with the I.R.S. Petitioner was never advised by the Moskowitz firm of Cohan's hiring.

At some point in time of 2002, an attorney by the name of Michael Stepanian traveled from California to South Florida to advise Petitioner he was soon to be charged with tax crimes in federal court and referred him to attorney William Cohan, who previously unbeknown to Petitioner, worked on behalf of the Moskowitz firm. Cohan never disclosed his association with Moskowitz firm nor his contact with the IRS concerning Petitioner's case. In fact, counsel Cohan intentionally deceived Petitioner concerning his connection with the $50,00.00 [sic] payment to the Moskowitz firm and counseled Petitioner not to seek any civil or other remedial action against the firm.[5] Neither the Moskowitz firm nor Cohan performed any services to settle any prospective tax due and owing. Instead, based upon information and belief, counsel Cohan sought to have the government indict defendant for the purpose of a large retainer fee on representation. A covert scheme of non-disclosures and unethical activities, which if proven as true and correct, render Cohan's loyalties opposite that of Petitioner which in turn prevented him from performing his adversarial duties as effective assistance of counsel under the Sixth Amendment. Had Petitioner been aware of counsel's connection with Moskowitz firm, he would

[5] Cohan did advise Petitioner in 2002 that he may be able to obtain a $20,000 credit from the Moskowitz firm as if he were obtaining a refund, when in fact it was Cohan's participation with Moskowitz that actually took the $50,000 to begin with and failed to provide promised services, some of which was paid to Cohan.

have never hired counsel Cohan nor pled guilty under Cohan's advice.

The Sixth Amendment right to effective assistance of counsel derives from the defendant's fundamental right to a fair trial, a goal best achieved by ensuring that the process involves vigorous partisan advocacy by both sides. Thus, the right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.[6] When a defendant has been able to show his counsel actively [represented] conflicting interests and that [an] actual conflict of interest adversely affected his lawyer's performance, constitutional error has occurred, and prejudice is inherent in the conflict.[7] In cases where a defendant demonstrates such a conflict, as is herein Divine, "we do not ask whether the actual conflict prejudiced the appellant's defense. Prejudice is presumed."[8]

Ineffective Assistance at the Rule 11 hearing.

Petitioner avers that counsel Coahan [sic] coerced the plea with threats which is evidenced by witnesses and officers of the Court who are available to testify should the Court grant an evidentiary hearing.

Specifically, during the Rule 11 hearing, prior to the Court's acceptance of the plea, Petitioner adamantly represented to counsel Cohan that he was not in agreement as to the elements of the charged offense conduct nor

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[6] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[7] *Strickland*, at 692).

[8] *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)).

was he guilty of the same and wished to proceed to trial and on the alleged evidentiary/affirmative defenses. Counsel Cohan lost his composure, physically struck the surrounding fixtures and yelled at Petitioner in a threatening instruction that if he [Petitioner] did not accept the government's offer and plead to the offense, he would be immediately revoked on his bail, be given at [sic] minimum of five years custody and for which he [counsel Cohan], would immediately withdraw from the representation of Petitioner. Cohan further advised Petitioner he did not want to hear from any expert witnesses previously retained by Petitioner nor any further alleged defense of the charges. Additionally, Cohan advised his wife and daughter would receive a 5 year term.

Cohan's conduct as stated in the afore were [sic] witnessed by officers of the Court who are willing to testify as to the alleged events herein. Additionally, professional experts are willing to appear and testify as to Cohan's attempts to dissuade them from any further exculpatory or other defense work on Petitioner's behalf.

A guilty plea and appellate waiver is valid only if made voluntarily, knowingly, and intelligible. There are three core objectives of Rule 11: (1) ensuring that the guilty plea is free of coercions;[9] (2) ensuring that the defendant understands the nature of the charges against him[10]; and (3) ensuring that the defendant is aware of the direct consequences of the guilty plea. Failure to satisfy

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[9] "Voluntariness implicates . . . as well as coercion and threats". *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

[10] It is noteworthy to mention that during the Court's colloquy as to the offense, Petitioner stated his actions were "not to conceal taxes" (plea hearing at p. 88), thus rendering the plea without a factual basis.

any of the core objectives violates the defendant's substantial rights.

The assistance of counsel is relevant to the question of whether a defendant's plea was knowing and intelligent insofar as it affects a defendant's knowledge and understanding. *See* ***McMann v. Richardson***, 397 U.S. 759, 770-71 (1970). Counsel Cohan's threats and coercion standing alone, renders the plea constitutionally infirm. *See also,* **1A Charles A Wright, Federal Practice and Procedure**, § 172, 142-44 (3d ed. 1999) (stating that a plea of guilty is not voluntary if it is induced by threats, misrepresentations . . . of an improper nature).

Normally, a defendant's statements at the Rule 11 hearing concerning a lack of coercion or threats are presumed as true unless a defendant reasonably alleges why they are not. Petitioner has submitted a plethora of reasons as to why they are not. Importantly, factual evidence exists outside the record for which Petitioner request [sic] an evidentiary hearing to support the same. In sum, Cohan coerced the plea with threats and suppressed the Petitioner's attempts at adducing exculpatory evidence, Cohan's deficiencies in his representation were prejudicial to Petitioner's defense. Had it not been for counsel's conduct, there is a very reasonable probability that Petitioner would not have pled guilty. *See* ***Hill v. Lockhart***, 474 U.S. 52, at 59 (1985).

Counsel Noel Spaid-Sentencing

Petitioner submits that his counsel at the sentencing likewise failed to comport with the constitutional commands of effective assistance of counsel. As a preliminary failure, counsel and the Probation Officer knowingly failed

to comply with Federal Rules of Criminal Procedure at 32(e)(2) requiring that the defendant be provided with a copy of the presentence report to read and discuss the same with counsel "at least 35 days before sentencing", and submit objections "within 14 days after receiving the presentence report". *Id.* at Rule 32(f)(1) Fed.R.Crim.P. Petitioner was prejudiced as a result of the inability to have adequate time to study the Report, formulate objections and provide a meaningful rebuttal.

At the time of sentencing, Petitioner Divine had never seen a copy of the presentence report prior to entering the Court. The following colloquy ensued:

> THE COURT: Did he read the presentence report?
>
> MS. SPAID: No. It would be about five minutes.
>
> THE COURT: Pardon me?
>
> MS. SPAID: I have already discussed it in my papers
>
> THE COURT: Well, he needs to read it. . . .
>
> PORBATION [sic] OFFICER: Yes, your Honor, I think there was. . . .
>
> THE COURT: Mr. Divine is going to have to read that. So let the clerk know he's done reading it. All right. We'll take a recess

In sum, counsel's failure to comply with the Rule prejudiced defendant inasmuch as he lacked the ability to timely formulate a defense of the PSR allegations regarding the offense level. Waiting until the moment of sentencing and allowing five minutes to review a PSR severely impedes a defendant's ability to effectively rebut the allegations with meaningful objections or to obtain evidence,

documents, or expert witnesses in connection. This is the purpose of prior disclosure. Had the PSR been properly disclosed, Petitioner could have provided the necessary rebuttal evidence and documents he now has to support his objection to a lower offense level.

PSR Enhancements

Petitioner was also assessed a two-point enhancement on the bases [sic] of an alleged use of "sophisticated means of concealment". As noted *supra*, Petitioner retained a law firm specializing in IRS cases for the sole purpose of reconciling past due taxes. This affirmative conduct of notifying the IRS he may owe back taxes and his willingness to settle the same and disclose his records occurred several years *prior to any criminal charges,* and obviously cannot square with a "sophisticated concealment" enhancement. If anything, this conduct merits a downward departure as a result of attempting to pay the debt prior to the discovery or bringing of charges. In any event, the insurmountable facts certainly goes against the Application Notes of the enhancement under U.S.S.G. § 2T1.1(b)(2). Accordingly, counsel Spaid's failing to object to sentencing enhancements improperly applied and failing to recognize overt and compelling legal authority favorable to the defendant falls below an objective standard of reasonableness. *See* United States v. Franks, 230 F.3d 811, 814 (9th Cir. 2000).

III.

Hearing on the Issues

Petitioner moves for an evidentiary hearing on the issues in order to develop the record for evidence that

exists outside the record. Petitioner's burden for a hearing is not an onerous one. A habeas corpus petitioner is entitled to an evidentiary hearing on his claim "if he alleges facts which, if proven, would entitle him to relief", *Sanders v. United States*, 373 U.S. 1 (1963); 28 U.S.C. § 2255. A hearing would be appropriate in this case.

IV.

Conclusion

In view of all the foregoing, and after hearing the evidence adduced upon an evidentiary hearing, Petitioner moves that the plea and sentence be vacated.

Respectfully submitted this 28th day of December, 2005.

/s/ J. Charles Wilson
J. CHARLES WILSON
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Attorney for Defendant

/s/ for William Conti
WILLIAM CONTI
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Local Counsel for Defendant

Certificate of Service

I certify that on this 28st [sic] day of December, 2005, I served a true and correct copy of the forgoing Motion pursuant to 28 U.S.C. 2255, upon the Counsel for United States by placing a copy of the same, first class postage prepaid and properly addressed to:

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United States Attorney
CHRISTOPHER MAIETTA
Assistant U.S. Attorney's
880 Front Street, Room 6293
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/s/ J. Charles Wilson

APPENDIX D

J. CHARLES WILSON
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Attorney for Defendant
LONNIE DIVINE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, Vs. LONNIE DIVINE, Defendant.	Criminal Case No. 03CR273-BTM 03CR2508-BTM (Consolidated) **PETITIONER'S MEMORANDUM WITH POINTS OF AUTHORITIES IN SUPPORT OF MOTION TO, RECONSIDER ORDER DENYING 28 U.S.C. 2255 MOTION** Dept: HON. BARRY T. MOSKOWITZ

Comes Now, defendant Lonnie Divine, by and through undersigned counsel and files this memorandum with points and authorities in support of the motion to reconsider the order denying relief pursuant to 28 U.S.C. 2255.

Discussion

In pertinent part, this Court's previous order denying the Section 2255 motion held that Petitioner was not entitled to an evidentiary hearing on his claims of the conflict of interest and defective plea because "Divine has not produced one shred of evidence to support it". *Id.* at p.3. However, in denying the hearing request, the Court

correctly surmised Petitioner's claims regarding previous defense counsel's conflict of interest. *I.e.*, threats and coercion, and more specifically, Divine's claims which described an existing letter from previous counsel to the I.R.S. which therein delineated his [Cohen's] request that the "government act before the limitations period expired on the statute",[1] and therefore counsel had a significant part in inciting the prosecution against Divine for purpose of arranging a subsequent representation and retainer fee. Divine also set forth the circumstances in which Cohen conspired with another attorney who visited Divine in Florida for purpose of referring Divine to Cohen once the prosecution was initiated.

Divine further alleged Cohen's first-hand involvement in a monetary fraud upon him and his wife for which the California Bar Association suspended the license of another attorney involved with Cohen for the same act(s).

Finally, Divine set forth the threats and coercion exhibited by Cohen which was witnessed by another officer of the Court who was willing to testify as to the same.

Divine's Request for Evidentiary Hearing:

In support of the facts alleged, Divine requested an evidentiary hearing to substantiate the claims and facts alleged and to provide witness testimony and the documentary evidence.

Divine reiterated his request and set forth the details in a reply to the government's answer to the 2255 motion.

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[1] Cohen was not Divine's retained counsel at the time of the transmission of the letter.

Court's Judgment:

Petitioner respectfully submits the Court's order denying the motion for relief under Section 2255 and likewise the requested evidentiary hearing on the basis that he had not provided any evidence, "not even a self-serving declaration" is contrary to the record, but moreover, is procedurally incorrect.

Divine set forth a plethora of valid claims and statements in support of his request for a hearing. Petitioner's burden for entitlement to an evidentiary hearing is not an onerous one because a petitioner is entitled to an evidentiary hearing on his claim "if he alleges facts which, if proven, would entitle him to relief" and "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the district court shall conduct a hearing on the claim". *Sanders v. United States*, 373 U.S. 1 (1963). Cited and followed in *United States v Scrivner*, 167 F.3d 525 (9th Cir. 1999); *U.S. v. Gutierez*, 166 F.3d 412 (9th Cir 1997).

Therefore, the Court's statements which set forth Divine's valid claims, but at the same time denying a hearing because he had not produced the evidence in the 2255 brief to support it, is not the correct standard. Divine was entitled to a hearing to prove the facts that existed outside the record that he unambiguously and succinctly set forth in his pleadings[2] because *if proven as true it would entitle him to relief.*

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[2] Petitioner is at a loss to comprehend the Court's statement that Divine had "not even produced a self-serving declaration in support of his tale of deception and intrigue", when in fact the pleadings are replete with declarations and allegations of factual events.

In view of the foregoing, petitioner moves that the Court reconsider the order denying Petitioner's request for an evidentiary hearing.

Respectfully submitted this 28th day of March, 2006.

/s/ J. Charles Wilson	/s/
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Attorney for Defendant	Local Counsel for Defendant

Certificate of Service

I certify that on this 28th day of March 2006, I served a true and correct copy of the foregoing Notice of Appearance, upon the Counsel for United States by placing a copy of the same, first class postage prepaid and properly addressed to:

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/s/ J. Charles Wilson